IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel. W. A. DREW EDMONDSON, in his capacity as ATTORNEY GENERAL OF THE STATE OF OKLAHOMA and OKLAHOMA SECRETARY OF THE ENVIRONMENT C. MILES TOLBERT, in his capacity as the TRUSTEE FOR NATURAL RESOURCES FOR THE STATE OF OKLAHOMA,	)	
Plaintiff,	)	
vs.	)	**05-CV-0329 GKF-SAJ**
TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC., COBB-VANTRESS, INC., AVIAGEN, INC., CAL-MAINE FOODS, INC., CAL-MAINE FARMS, INC., CARGILL, INC., CARGILL TURKEY PRODUCTION, LLC, GEORGE'S, INC., GEORGE'S FARMS, INC., PETERSON FARMS, INC., SIMMONS FOODS, INC., and WILLOW BROOK FOODS, INC.,	)	
Defendants.	)	

PETERSON FARMS, INC.'S MOTION FOR PROTECTIVE ORDER PROHIBITING FURTHER EX PARTE COMMUNICATIONS BETWEEN PLAINTIFFS' COUNSEL AND KERRY KINYON AND STRIKING PLAINTIFFS' REQUESTS FOR PRODUCTION OF DOCUMENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

FACTUAL BACKGROUND 2

I. THE HIGH RISK THAT KINYON WILL UJNILATERALLY BREACH PETERSON'S PRIVILEGES AND CONFIDENCES JUSTIFIES AN ORDER BARRING PLAINTIFFS FROM FURTHER *EX PARTE* COMMUNICATIONS 7

A. Plaintiffs' *Ex Parte* Communications with Kinyon were Improper Under The Oklahoma Rules of Professional Conduct and Analogous Interpreting Authority 8

B. Notwithstanding any Prior Violation of Ethical Rules, Peterson's Rights Dictate That Plaintiffs' Communications With Kinyon be Limited to Formal Discovery 16

II. THE COURT SHOULD STRIKE PLAINTIFFS' REQUESTS FOR IRRELEVANT AND CONFIDENTIAL DOCUMENTS RELATING TO KINYON 17

CONCLUSION 19

CERTIFICATE OF SERVICE 21

TABLE OF AUTHORITIES

CASES

Arnold v. Cargill, 2004 WL 2203410 (D. Minn. 2004) 13, 14, 15, 16, 17

Dillon v. Sico Co., 1993 WL 492746 (E.D. Pa. 1993) 12, 13, 15, 16

Fulton v. Lane. 829 P.2d 959 (Okla. 1992) 9, 10

Jenkins v. Missouri, 931 F.2d 470 (8th Cir. 1991) 16

Spencer v. Steinman, 179 F.R.D. 484 (E.D. Pa. 1998) 16

STATUTES AND RULES

Fed. R.Civ. P. 26 18

Preamble to the OKLAHOMA RULES OF PROFESSIONAL CONDUCT 10

Rule 4.2 of the OKLAHOMA RULES OF PROFESSIONAL CONDUCT, Okla. Stat. tit. 5, ch. 1 . . . . . 8, 9, 10

Rule 4.3 of the OKLAHOMA RULES OF PROFESSIONAL CONDUCT, Okla. Stat. tit. 5, ch. 1 11

Rule 4.4 of th e OKLAHOMA RULES OF PROFESSIONAL CONDUCT, Okla. Stat. tit. 5, ch. 1 11

N.D. LcvR 83.7 9

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PETERSON FARMS, INC.'S MOTION FOR PROTECTIVE ORDER PROHIBITING FURTHER EX PARTE COMMUNICATIONS BETWEEN PLAINTIFFS' COUNSEL AND KERRY KINYON AND STRIKING PLAINTIFFS' REQUESTS FOR PRODUCTION OF DOCUMENTS

Defendant Peterson Farms, Inc. ("Peterson") hereby files its Motion for Protective Order seeking an Order from the Court prohibiting any further *ex parte* communications between Plaintiffs' counsel and Kerry Kinyon ("Kinyon"), a former executive of Peterson who has knowledge of privileged and confidential information of Peterson and the work product of its counsel in this matter, and who has expressed a desire to sell information to Plaintiffs. Peterson has requested Plaintiffs' counsel to refuse communication with Kinyon except through a deposition and/or Rule 45 Subpoena to enable Peterson the opportunity and right to protect its privileged and

confidential information from disclosure, yet Plaintiffs' counsel have repeatedly refused.[1] This refusal to terminate continued *ex parte* communications with Kinyon undermines Peterson's ability to protect its privileged, confidential and trial preparation materials from disclosure to Plaintiffs, and presents a likely risk of irreversible harm to Peterson. Peterson further moves the Court for an Order striking two of Plaintiffs' Request for Production of Documents included in their September 13, 2007 set, which seek irrelevant and confidential records involving Kinyon.

FACTUAL BACKGROUND

Kinyon was employed by Peterson on two different occasions for many years. During his latest period of employment, he served in the positions of Chief Operating Officer and Vice President of Operations. Kinyon resigned his employment with Peterson on November17, 2006. Beginning with the lawsuit filed by the *City of Tulsa* against Peterson and others in 2001 and continuing through the current lawsuit to the date of his departure, Kinyon has served as the primary liaison between the Corporation and its outside litigation counsel. Kinyon was intimately involved in all aspects of litigation involving Peterson, and as such, he was within the control group that participated in all attorney-client communications, he participated in strategy meetings and discussions with outside counsel, he participated in joint defense communications with counsel and representatives of other Defendants, and many times, he made the ultimate decisions affecting Peterson's litigation strategies. He was a key decision maker during the settlement process in the *City of Tulsa* case, and was one of Peterson's representatives at the mediation in this case conducted

[1] Counsel for Peterson and Plaintiffs exchanged multiple letters, e-mails and participated in two telephone conferences to attempt an informal resolution of the issues Peterson raises in the instant Motion; however, Plaintiffs' counsel refused to budge on all of the issues, which necessitates Peterson's request for relief from the Court.

before the Honorable Thomas Brett. Overall, Kinyon was an integral part of Peterson's legal team, and, as such, was exposed to all of Peterson's privileged and confidential information.

On November17, 2006, Kinyon resigned as the Vice President of Operations for Peterson. It has since become clear that Mr. Kinyon did not leave his employ a happy man. In fact, not long afterwards, he both threatened and commenced a proceeding against Peterson asserting employment-related claims. These actions and the following history reflect that Kinyon is a bitter man, who for reasons unknown to Peterson, has set out to hurt the company he helped manage for many years.

On February 19, 2007, and shortly after Kinyon left the employ of Peterson, Kinyon sent a blind email to Plaintiffs' counsel, Joe Rice, offering to "tell his story."[2] Kinyon's anger and resentment associated with his separation from Peterson is clearly portrayed in the email. Most disturbing is Kinyon's clear expression that he desires to be paid for sharing information with Plaintiffs. His motives were unmistakable. Although he stated, "I am not pursuing a big payday...," he clearly was pursuing a payday of some magnitude.

Although Kinyon did not reveal his name in the initial email to Mr. Rice, he did identify himself as "a former poultry executive with one of the companies in litigation with the Attorney General of Oklahoma (I was present with you in a Tulsa meeting)." Two days later on February 21, 2007, Kinyon sent another email in which he revealed his identity. Plaintiffs' counsel emailed Kinyon back on the same day stating that they were very interested in talking with Kinyon. Also on this date, Kinyon mailed a copy of the emails to Attorney General Drew Edmondson. Likewise,

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[2] Due to the sensitive nature of these e-mail communications, Peterson has not attached them to this Motion, but will provide the Court the full set of communications produced by Plaintiffs at the hearing hereon.

General Edmondson acknowledged in a written Response to Mr. Kinyon that he looked forward to hearing what he had to say.

Plaintiffs' counsel again emailed Kinyon on March 12, 2007. This email made mention of ethical issues that Plaintiffs' counsel wanted to address before proceeding with further communications. Plaintiffs' counsels' purported attempt to satisfy their ethical obligations was limited to posing four (4) yes or no questions to Kinyon to ascertain whether he was represented by counsel, was still employed by Peterson, or was a party to a consulting agreement with Kinyon. Kinyon responded on the following day by answering in the negative to all four questions. As a result, on March 14, 2007, Plaintiffs' counsel sent Kinyon an email to establish a meeting place. Kinyon and Plaintiffs' counsel had continuing communications via email and telephone over the next days and weeks. Plaintiffs' counsel claims that the only substantive information that was discussed by Kinyon was the fact that Kinyon was aware of certain conduct by Peterson he wanted to reveal to Plaintiffs, although he "was not sure or did not think that his information about Peterson Farms. . .would be relevant to the Lawsuit." Kinyon also offered to provide a "confidential envelope" of Peterson documents to Plaintiffs' counsel. Plaintiffs' counsel claim that they have received no such envelope.

The factual background provided above clearly portrays the extent of Kinyon's willingness to breach Peterson's privileges and confidences. This background and the following chronological recitation of facts give rise to this filing.

1. On or about March 30, 2007, Peterson served its First Set of Interrogatories and Requests for Production of Documents on Plaintiffs. Interrogatory No. 1 provided:

> Please fully describe any communications you have had with any current or former employee of or poultry grower who has ever contracted with Peterson Farms that

> occurred since the Lawsuit was filed, or pertained to any of the claims or defenses asserted in the Lawsuit.

2. On June 1, 2007, Plaintiffs served their answers and responses, and in particular, their answer to Interrogatory No. 1 provided:

> Communications with Mr. Kerry Kinyon. These communications occurred earlier this year. These communications, initiated by Mr. Kinyon, occurred by e-mail and by phone, and, to date, have dealt with the parameters of permissible communications, the circumstances under which those permissible communications should occur, and, in very general terms, the subject matter of information that he might want to share with the State.

3. Being acutely aware of the privileged, confidential, and highly sensitive information Kinyon possesses, Peterson's counsel sent a letter to Plaintiffs' counsel on July 20, 2007 emphasizing that Kinyon was a former high ranking member of Peterson's management team and, as such, was privy to a great amount Peterson's privileged information that directly related to this lawsuit. (Copy attached hereto as Ex. "1".) Peterson requested that Plaintiffs provide it a copy of the communications that had already taken place with Kinyon as well as a full explanation of all matters discussed. *Id.*

4. On August 9, 2007, Plaintiffs responded to Peterson's letter by providing a timeline of the communications with Kinyon. Attached to the letter were copies of email correspondence between Kinyon and Plaintiffs' counsel. (Copy of which, without attachments, is attached hereto as Ex. "2".)

5. On August 23, 2007, upon learning that Kinyon had offered to sell Peterson's confidences and privileged information to Plaintiffs, Peterson's counsel wrote Plaintiffs' counsel reiterating Kinyon's former position within Peterson's control group and the obvious fact that Kinyon was privy to information that could only be disclosed upon Peterson's authority. (Copy

attached hereto as Ex. "3".) Peterson's counsel also noted that given Kinyon's obvious anger, disdain and willingness to breach Peterson's privileges and confidences it would be prudent for Plaintiffs to discontinue any further *ex parte* communications. Peterson specifically requested that Plaintiffs only communicate with Kinyon by way of a deposition subpoena since this was the only procedure that afforded Peterson the opportunity to assert and protect its privileged and confidential information. Peterson requested Plaintiffs' agreement to follow these proposed guidelines. *Id.*

6. Receiving no response, Peterson's counsel sent a third letter to Plaintiffs' counsel on September 6, 2007. (Copy attached hereto as Ex. "4".) Again, Peterson's counsel reiterated the importance of the matter and further requested that all future communications between Kinyon and Plaintiff be restricted to a deposition and/or subpoena.

7. On September 6, 2007, Plaintiffs' counsel wrote to Peterson's counsel expressing their intention to take Kinyon's deposition, while refusing to state any agreement to halt their *ex parte* communications. (Copy attached hereto as Ex. "5".) Rather than respond to Peterson's clear and reasonable request for a procedure that would protect Peterson from the risk that Kinyon would unilaterally breach Peterson's privileges and confidences, Plaintiffs chose to obscure the issue with unfounded allegations that Peterson's true desire was to intimidate Kinyon from disclosing discoverable information.

8. On September 24, 2007, Peterson sent yet another letter to Plaintiffs' counsel requesting that they respond to the issue presented, *i.e.*, to state clearly whether or not they agree to refrain from conducting further *ex parte* communications with Kinyon. (Copy attached hereto as Ex. "6".) It was clearly understood by Plaintiffs' counsel that these communication with Peterson were pursuant to Local Civil Rule 37.2 as a prelude to a Motion for Protective Order.

9. On September 24 and 25, 2007, counsel for Plaintiffs and Peterson exchanged email correspondence on the issue. Plaintiffs' counsel refused to agree to end *ex parte* communications with Kinyon and stated that Plaintiffs had "disclosed all information about [Plaintiffs'] contacts with Mr. Kinyon to which Defendant Peterson is entitled." (Copy of e-mail correspondence attached hereto as Ex. "7".)

10. On October 2 and 3, 2007, counsel for Plaintiff and Peterson discussed by telephone Peterson's request for Plaintiffs to end *ex parte* communications with Kinyon; again, Plaintiffs refused. In these two conversations, counsel discussed Peterson's position with regard to the two requests for production of documents seeking Peterson's communications with Kinyon and Kinyon's personnel file. Plaintiffs refused to narrow or withdraw either of the requests, and this Motion for Protective Order ensued.

ARGUMENT AND AUTHORITIES

I. THE HIGH RISK THAT KINYON WILL UNILATERALLY BREACH PETERSON'S PRIVILEGES AND CONFIDENCES JUSTIFIES AN ORDER BARRING PLAINTIFFS FROM FURTHER *EX PARTE* COMMUNICATIONS

Throughout the extraordinary efforts Peterson undertook to resolve this matter informally with Plaintiffs, one fact has become painfully clear - Plaintiffs are ignoring that even if they do not expressly solicit privileged or confidential information, Kinyon has shown himself to be so disposed as to present a very high risk that he will unilaterally breach Peterson's lawful protections against disclosure either as a consequence of his ignorance or his overt desire to hurt his former employer. Thus, the history of Plaintiffs' conduct vis-a-vis Kinyon raises two issues. First, have Plaintiffs' counsel violated the Oklahoma Rules of Professional Conduct in the course of these dealings? And second, whether or not Plaintiffs' counsel violated their ethical duties, does the clear risk that

Kinyon will unilaterally act to destroy Peterson's right to protect privileged information from disclosure and the irreparable harm that would result from such act compel the Court to order that such *ex parte* communications cease? To determine the first issue completely, Peterson requests the Court hold an *in camera* hearing with Plaintiffs' and Peterson's counsel in order to obtain a full disclosure of the communications between Plaintiffs' counsel and Kinyon. The results of such inquiry by the Court will dictate whether further action or briefing by the parties or the Court is implicated. As to the second issue, the record of the communications by Kinyon, his very recent role within the litigation control group in this matter, and his pending employment claims against Peterson undeniably establish a *prima facie* case for precluding any further *ex parte* communications by Plaintiffs' counsel.

A. Plaintiffs' *Ex Parte* Communications with Kinyon were Improper Under The Oklahoma Rules of Professional Conduct and Analogous Interpreting Authority

Plaintiffs' counsel will undoubtedly argue that their conduct pursuing communications with Kinyon was proper because they first ascertained that: (1) he was not represented by counsel; (2) that he was no longer employed by Peterson; and (3) he was not a party to a consulting agreement with Peterson. They will contend further that they are fault free because they expressly advised Kinyon not to disclose privileged information. However, the law required Plaintiffs' counsel to do much more to fulfill their ethical duties. When the entire factual underpinnings are added to the equation, in particular, Kinyon's recent role as the liaison with Peterson's counsel in this case and his obvious motivation to hurt Peterson to the point of being willing to destroy his credibility by asking for money, it becomes quite clear that Plaintiffs' counsel viewed their ethical obligations through a key-hole, and merely paid lip service to Rule 4.2 of the Oklahoma Rules of Professional Conduct to further their interests.

Rule 4.2 of the OKLAHOMA RULES OF PROFESSIONAL CONDUCT, Okla. Stat. tit. 5, ch. 1, app. 3-A[3] provides:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by the law to do so.

Comment 4 to RULE 4.2 addresses the issue of *ex parte* communications as it relates to organizations.

> In the case of an organization, this Rule prohibits communications by a lawyer for another person or entity concerning the matter in representation with persons having managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization. If an agent or employee of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(f).

Neither the Rule nor the Comment specifically address the issue of *ex parte* communications with a former employee who was member of the control group. Thus Plaintiffs likely will seek to justify their actions by pointing to the fact that as a former employee, Kinyon can not speak and bind the corporation. As far as that simplistic approach goes, Plaintiffs can draw support from the Supreme Court of Oklahoma that made passing mention of this issue in *Fulton v. Lane*, 829 P.2d 959 (Okla. 1992). The issue presented in the case at bar was not passed on by the court, as *Fulton* involved *ex parte* communications with current employees of a party. *Id.* at 960. The court did

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[3] The local rules for the United States District Court for the Northern District of Oklahoma mandate that attorneys should conform their behavior to the Oklahoma Rules of Professional Conduct. LCvR 83.7. The Oklahoma legislature recently approved amendments to Rule 4.2, however the amendments do not take affect until January 1, 2008.

comment in dicta, however, that "[b]ecause former employees of a corporation may not speak for or bind the corporation, ex parte communications with former employees are not prohibited." *Id.*

Plaintiffs would have the analysis end here, but it does not. The Oklahoma Rules of Professional Conduct operate as a seamless fabric defining how attorneys are to represent their clients, deal with other represented and unrepresented parties, and interact with the Court. The Preamble to the RULES OF PROFESSIONAL CONDUCT: *A Lawyer's Responsibilities* provides that "[w]ithin the framework of these Rules many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules." Okla. Stat. tit. 5, ch. 1, app. 3-A. The Preamble continues describing the *Scope* of the Rules by stating that they "presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general." *Id.* Thus, in evaluating Plaintiffs' counsels' conduct, the Court cannot engage in the "key hole" approach these counsel employed when they decided to engage Peterson's former executive in *ex parte* communications.

Plaintiffs' communication with Peterson's counsel reveals that Plaintiffs do not appreciate that by providing the avenue for Kinyon to disclose privileged communications, attorney work product, trial preparation materials and confidential business records, they are exposing Kinyon to potential personal liability as a former executive of Peterson. Let there be no doubt about it, Peterson does not dispute, nor does it seek to obstruct Plaintiffs' ability to obtain relevant factual discovery from Kinyon; hence, Peterson's request that all communications occur through formal discovery means. On the contrary. This controversy stems from a former highly-placed executive

who has sensitive protected information, who Plaintiffs know is both distraught and motivated to injure Peterson's interests. Thus, Plaintiffs should have also appreciated that by engaging in these communications, they very likely would be a party to Kinyon hurting himself as he breached Peterson's protections against disclosure. OKLAHOMA RULE OF PROFESSIONAL CONDUCT 4.3, *Dealing with Unrepresented Parties*, required Plaintiffs' counsel to respect Kinyon's rights, and the potential liability he was exposing himself to. Okla. Stat. tit. 5, ch. 1, app. 3-A. They were obligated to deal fairly with him, yet there is no indication that they advised Kinyon to consult with a lawyer before he turned over confidential records belonging to Peterson. Unfortunately, it is fair to assume the reason Plaintiffs' counsel withheld such advice was that it would likely have terminated the exchange.

Plaintiffs' counsels' methods also implicate OKLAHOMA RULE OF PROFESSIONAL CONDUCT 4.4, *Respect for Rights of Third Person.* This Rule prohibits Plaintiffs from obtaining evidence in a manner that violates the legal rights of Peterson. Okla. Stat. tit. 5, ch. 1, app. 3-A. Thus, Plaintiffs' counsel cannot simply stand by and receive information and documents from Kinyon that they know they would not be able to obtain through the formal discovery processes. By playing coy and refusing to conduct their exchanges with Kinyon in the light of day where Peterson could assert its privileges, they were very much anticipating that Kinyon's anger and lack of sophistication would lead to the disclosure of information and documents which the law would otherwise protect. Requiring that Plaintiffs conduct their discovery through formal processes serves to protect Peterson's rights, while denying Plaintiffs nothing to which they are entitled.

Plaintiffs' counsels' readiness to turn a blind eye to the Rules is self evident from their communications with Kinyon. Specifically they tried to protect themselves by asking Kinyon not

to reveal any confidential information about Peterson. The likely ineffectiveness of this request is obvious. While Kinyon clearly desired to disclose information to Plaintiffs to hurt Peterson, he is neither an attorney nor acting under the advice of an attorney, thus there is no indication that he has the ability to discern what information is confidential and/or privileged in order to know what he could properly give and/or tell Plaintiffs. The hypocrisy of Plaintiffs' counsels' admonition is revealed by their willingness to accept Kinyon's offer of a "confidential envelope." Based upon these instances alone, it is clear why Peterson requests this Court to require that any future communications between Plaintiffs and Kinyon be subject to the rules afforded through formal discovery.

The court in *Dillon v. Sico Co.*, 1993 WL 492746 (E.D. Pa. 1993) provided a framework for analyzing situations involving *ex parte* communications with former employees.

> Rather, if Rule 4.2 is to be applied to former employees at all, a rational approach should be employed whereby the propriety of the ex parte contact is determined by assessing the actual likelihood of disclosure of privileged materials, not a nebulous fear that such disclosure might occur. That assessment would depend upon weighing such factors as the positions of the former employees in relation to the issues in the suit; whether they were privy to the communications between the former employer and its counsel concerning the subject matter of the litigation, or otherwise; the nature of the inquiry by opposing counsel; and how much time had elapsed between the end of the employment relationship and the questioning by opposing counsel.

Id. at *5. The *Dillon* court focused its analysis on the risk that protected information would be divulged by the former employee. When the Court applies the *Dillon* framework to the facts of this case, it is clear that the risk of impermissible disclosure of protected information is not a mere "nebulous fear," but rather, it is likely to occur. First, Kinyon's position as Chief Operating Officer and Vice President of Operations placed him at the forefront of the issues involved in this lawsuit. Kinyon served as Peterson's primary contact with Peterson's outside counsel in all material aspects

of this and other litigation. Second, Kinyon, by virtue of his position with Peterson, was privy to nearly every substantive legal communication and strategy decision between Peterson, its outside counsel, its confidential consultants and the other parties to the joint defense effort. Third, the time that elapsed between the time Kinyon left the employ of Peterson and the time he first contacted Plaintiffs' counsel was only a matter of a few months. Accordingly, all of the sensitive information that Kinyon possesses is a matter of recent impression. Finally, Kinyon's willingness to divulge all the information that he knew was clear from the tone of his original email. He made it very clear to Plaintiffs' counsel that he knew confidential information and that he was willing to divulge that information for the right price. An application of the *Dillon* factors to this case illustrates the true risk presented and that confidential and/or privileged information could be divulged by Kinyon if proper safeguards are not implemented.

Peterson's counsel admonished Plaintiffs' counsel and advised them that their conduct was treading on very thin ice. Case in point was the court's decision to disqualify the plaintiffs' counsel for obtaining privileged information from a former employee in *Arnold v. Cargill*, 2004 WL 2203410 (D. Minn. 2004). In *Arnold*, an employment case, the plaintiffs' counsel approached a former Human Resources Manager for Cargill seeking to obtain information about Cargill's employment practices. *Id.* at *1-2. The former manger agreed to assist plaintiffs' counsel, and produced to counsel some 2000 documents that included Cargill confidential and privileged information. *Id.* at *2-3. Plaintiffs' counsel claimed that they admonished the former manager to not turn over any privileged or confidential documents, but it was undisputed that plaintiffs' counsel in fact received such information, including documents originating from and directed to Cargill's outside counsel in other employment matters. *Id.* at *3

Cargill's counsel argued to the court that plaintiffs' counsel had breached the Minnesota Rules of Professional Conduct by suggesting that the former employee might gain financially from the suit; and by soliciting improper assistance from the manager and inducing him to breach Cargill's confidences and privileges by using methods that violated Cargill's rights, among other offenses. *Id.* at *5. In consideration of the evidence, the court stated

> This is not simply a situation where Plaintiffs' counsel contacted a prospective witness with knowledge of underlying facts relevant to their investigation. Here, [plaintiffs' counsel] cultivated its relationship with Douglas, a former highly placed employee of Cargill who had extensive knowledge of the systems at issue in this suit and Cargill's past litigation strategies in similar cases, precisely because he possessed a wealth of relevant information.
>
> * * *
>
> The Court finds that [plaintiffs' counsel] knew that Douglas was extensively exposed to confidential and privileged information, including information learned through regular contact with Cargill's in-house and outside legal teams. The Court also finds that [plaintiffs' counsel] made no meaningful effort to protect Cargill's confidences and that [plaintiffs' counsel] eventually came into possession of documents marked privileged and confidential.

Id. at *7-8. There, as in the case at hand, the *Arnold* court contended with protestations by plaintiffs' counsel that they had taken steps to direct the former manager not to disclose confidential or privileged information. The court held:

> Those denials, however, ring-hollow for two reasons. First, considering Douglas' regular interactions with Cargill's legal representatives and the fact that he is not trained in the law, he was not in a position to determine what Cargill information was discloseable and what was not discloseable without assistance of counsel. Moreover, it is conceivable, if not likely, that privileged and confidential information was disclosed by Douglas in conversation, even if unconsciously. Second, the Court's concern that privileged and confidential information was indeed disclosed and discussed, is not assuaged by [plaintiffs' counsels'] assertions to the contrary.
>
> Accordingly, this Court finds that [plaintiffs' counsel] violated Cargill's confidentiality rights as prohibited by Rule 4.4.

Id. at *8. Based upon this violation and others, the court disqualified the entire plaintiffs' law firm from the case. *Id.* at *13.

When applying this analysis to Plaintiffs' counsels' communication with Kinyon, the potential for irreparable harm to Peterson is even greater than that found by the *Arnold* court. The former manager in Arnold had not worked for Cargill for 10 years prior to the liability period. *Id.* at *2. Here, Kinyon left Peterson's employ in the midst of the instant litigation. The *Arnold* opinion did not reflect that the former manager had an ax to grind with Cargill, as Kinyon clearly does with Peterson, yet there is a suggestion in both instances that the former managers were pursuing personal financial gain from the plaintiffs' counsel.

It is undisputed that Plaintiffs' counsel have already had multiple *ex parte* communications with Kinyon. It is undisputed that Kinyon was until very recently a member of Peterson's control management group, and was privy to Peterson's most protected information. It is undisputed that Plaintiffs' counsel are aware of Kinyon's breadth of knowledge of sensitive protected information, and remained willing to accept "confidential" documents from Kinyon. It is undisputed that Kinyon is resentful and angry with Peterson and is motivated to injure Peterson's interests. It is therefore, clear that Plaintiffs' counsels' conduct has or will intentionally or recklessly violate Peterson's right to protect its business confidential and privileged information. Accordingly, pursuant to the Oklahoma Rules of Professional Conduct and the analysis set forth by the courts in *Dillon* and *Arnold*, Plaintiffs' counsels' *ex parte* communications with Kinyon were and are improper, and therefore, Peterson respectfully requests the Court order them to cease.

B. Notwithstanding any Prior Violation of Ethical Rules, Peterson's Rights Dictate That Plaintiffs' Communications With Kinyon be Limited to Formal Discovery

The federal district courts have the authority and responsibility to regulate and supervise the attorneys appearing before it. *Jenkins v. Missouri,* 931 F.2d 470, 484 (8th Cir. 1991). Whether or not the Court finds that Plaintiffs' counsel have violated their ethical obligations, Peterson respectfully requests that Court exercise its power to uphold Peterson's right to protect its business confidential information, privileged information and attorney work product under the applicable state and federal law by holding that Peterson's rights outweigh Plaintiffs' right to seek informal discovery from this one fact witness. The holdings of the *Dillon* and *Arnold* courts interpreting ethical rules parallel to the Oklahoma Rules of Professional Conduct support this outcome.

The Rules do not exist in a vacuum. A dose of logic applied to the facts of this case lead to the conclusion that Plaintiffs should restrict all further communications with Kinyon to formal discovery processes. Consider again Rules 4.2 and 4.3. On November 16, 2006, Kinyon was employed by Peterson within its managerial control group. There is no question that the Rules clearly prohibited Plaintiffs' counsel from speaking to him *ex parte*. This so because Rules 4.2 and 4.4 were implemented, in part, to protect privileged information from being "disclosed to an opponent in litigation." *Spencer v. Steinman,* 179 F.R.D. 484, 491 (E.D. Pa. 1998). The following day, Kinyon resigned. He is no longer an employee, so the express language of Rule 4.2 would seem to no longer apply. Yet, the policies underlying the Rules have not abated as the risk that Plaintiffs may obtain privileged information from Kinyon and the resulting harm to Peterson from such disclosure remain unchanged.

Several courts analyzing the overlap of the ethical rules and the rules protecting privileged information have adopted a logical, fair and flexible approach, to wit:

> Because of the close relationship between Rule 4.2 and rules protecting against the disclosure of attorney-client privileged information, courts in this district have adopted a flexible approach to prevent privileged information from being disclosed to an adverse party in the context of lawyer contact with a former managerial employee.

Arnold, 2004 WL 2203410 at *9 (citations omitted). These courts have adopted an approach that addresses the unfairness of this situation by focusing on "the likelihood that any privileged matters were intruded upon." *Id.* (citing *Olson v. Snap Products*, 183 F.R.D. 539 (D. Minn. 1998)). This analysis leads again to the inescapable conclusion that Kinyon's animus towards Peterson, and his overt acts to reach out and offer "confidential" information to Plaintiffs' counsel present a high risk of disclosure of information the state and federal rules of privilege exist to protect.

Peterson has no interest in preventing Kinyon from testifying to relevant facts in this matter. In fact, Plaintiffs have already stated that they intend to take his deposition. Because of the risk of impermissible and uncontrolled disclosure of Peterson's protected information, Peterson seeks only for the Court to limit Plaintiffs' counsel (and their agents) from communicating with Kinyon or accepting any documents from Kinyon unless produced pursuant to a properly noticed subpoena.

II. THE COURT SHOULD STRIKE PLAINTIFFS' REQUESTS FOR IRRELEVANT AND CONFIDENTIAL DOCUMENTS RELATING TO KINYON

Among Plaintiffs' Requests for the Production of Documents dated September 13, 2007 are two requests that seek the production of documents related to Kinyon that have no relevance to the issues raised by Plaintiffs' Second Amended Complaint or Peterson's defenses:

> Request for Production No. 22: Please produce copies of all correspondence between you (including your attorneys) and Mr. Kerry Kinyon since Mr. Kinyon's departure from your employ.
>
> Request for Production No. 23: Please produce copies of Mr. Kerry Kinyon's personnel file, including all work evaluations of Mr. Kinyon.

FED. R. CIV. P. 26(b)(1) provides: "Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party...." Kinyon's personnel file, work evaluations, and all correspondence from Peterson to him since his employment ended is wholly irrelevant to the issues presented in this lawsuit and is unlikely to lead to the discovery of admissible evidence. With regard to Request No. 22, the only responsive documents, with one exception, relate to Kinyon's resignation from Peterson and his ongoing employment claims against Peterson. The one exception is an item of correspondence from Peterson's counsel to Plaintiffs' counsel that was copied to Kinyon discussing the *ex parte* communications with Plaintiffs' counsel addressed in Section I, *supra*. (Ex. "3" hereto.) The remaining documents involve Kinyon's ongoing and threatened employment claims against Peterson that relate solely to the circumstances of Kinyon's separation from Peterson. These documents are neither relevant nor material to the Plaintiffs' lawsuit, and Peterson asserts that it would prejudice its position to disclose these documents while its unrelated dispute with Kinyon is pending.

Similarly, Plaintiffs' Request No. 23 contains an undifferentiated blanket request for Kinyon's personnel file. A request of this nature is unprecedented in this case, and is totally lacking a good faith basis for seeking the disclosure of a former highly placed executive's entire personnel file. This file also contains information that may be material to Peterson's employment dispute with Kinyon, the disclosure of which may prejudice its rights in this matter that has no connection whatsoever to the issues herein. Likewise, Peterson considers its personnel files to be sensitive confidential information that it protects not only for its own interests, but for those of its employees as well.

Peterson's counsel requested Plaintiffs' counsel to narrow these requests to topics that may have some relevance to the matters at hand, but Plaintiffs' counsel refused. Plaintiffs' refusal to narrow their requests, as well as the facial over breadth of the requests reveals them to be nothing more than the classic fishing expedition. It is worthy of note that out of the hundreds of employees that are or were employed by the Defendants in this action, Plaintiffs have requested this type of information about only one – Kinyon. As such, whether based on the over breadth and irrelevance of the requests, or based upon the prejudice that would result to Peterson through the disclosure of Kinyon's personnel file when unrelated employment claims are pending, Peterson respectfully requests the Court strike these requests.

CONCLUSION

The *ex parte* communications that have occurred between Plaintiffs' counsel and Kinyon are inconsistent with Plaintiffs' counsels' ethical obligation to respect Kinyon's rights and Peterson's well founded right to protect its privileged and confidential information from disclosure. Kinyon's very recent role as the primary liaison with Peterson's litigation counsel in this matter; Plaintiffs' knowledge of this fact and willingness to accept "confidential" information from Kinyon outside the light of day; and Plaintiffs' counsel's refusal to limit further communications to formal processes that will enable Peterson to assert its privileges against disclosure all support the conclusion that Peterson's rights can only be protected by way of an Order by the Court directing that Plaintiffs only communicate with Kinyon through a deposition or properly noticed Rule 45 subpoena. Further, the nature of Plaintiffs' past conduct is such that it is prudent for the Court to evaluate the matter further via an *in camera* hearing to fully elucidate these prior *ex parte* communications to determine if further action is required.

Finally, as Plaintiffs have propounded overly broad requests seeking confidential and sensitive personnel records and communications involving Kinyon that have no relevance or relationship to the issues in this action, Peterson requests the Court order that Peterson need not respond.

Respectfully submitted,

By /s/ A. Scott McDaniel

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CERTIFICATE OF SERVICE

I certify that on the 8th day of October, 2007, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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